

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PHILLIP J. LYONS,

Plaintiff,

vs.

STATE OF NEVADA ex rel, c/o ORTIZ, et
al.,

Defendants.

Case No. 2:10-CV-00707-JCM-(LRL)

ORDER

Presently before the court is plaintiff Phillip J. Lyons' motion for rule 54(h) certification and final judgment as to counts 1,2,3,4,5, and 7 and denial of first amended complaint. (Doc. #27). Defendants State of Nevada et al, filed an opposition. (Doc. #28). Plaintiff filed a reply. (Doc. #31).

Also before the court is defendants' motion for summary judgment. (Doc. #29). Plaintiff filed an opposition (doc. #33) and a motion to file supplement (doc. #34). Defendants filed a reply (doc. #35), and plaintiff filed a sur-reply (doc. #36). Defendants filed a motion to strike the sur-reply (doc. #38), plaintiff filed an opposition (doc. #39), and defendants filed a reply (doc. #40).

In the present action brought by inmate Phillip J. Lyons (doc. #1-2), he alleges seven claims for relief relating to his treatment while in custody at the Southern Desert Correctional Center in Indian Springs, Nevada. In the court's screening order (doc. #11), the court dismissed all of the plaintiff's claims except for the sixth. The court gave plaintiff thirty (30) days from the date of the order to submit an amended complaint in the event that he could cure the deficiencies. (Doc. #11).

1 The plaintiff was also provided with a civil rights complaint form with instructions. (Docs. #11-1
2 and #11-2).

3 Rather than filing an amended complaint as directed, plaintiff filed a motion for relief (doc.
4 #12), which was denied by the court (doc. #14). Subsequently, plaintiff filed another motion asking
5 the court to reconsider its order, once again in lieu of following the instructions of the court. (Doc.
6 #15). The court entered an order (doc. #17) denying the motion and dismissing several named
7 defendants and counts 1,2,3,4,5, and 7 for failure to state a claim. Plaintiff then filed a motion for
8 relief from the order (doc. #18) and a motion to amend or correct complaint (doc. #19). The court
9 denied both motions. (Doc. #24).

10 In the present motion for certification (doc. #27), plaintiff asks this court to enter final
11 judgment on the dismissed counts and the order denying his motion to amend, so that he can appeal
12 them to the Ninth Circuit. He contends that the remaining count, count six, is “totally unrelated” to
13 the dismissed counts and that there “is no just reason for delaying a final judgment on those
14 dismissed counts until count six is concluded.”

15 In opposition (doc. #28), remaining defendants assert that their motion for summary
16 judgment on count six (doc. #29) makes the motion for certification moot. They argue that it would
17 not be “sound judicial administration” for this court to certify prior to addressing their motion (doc.
18 #29). As first certifying the dismissal and the denial of the motion to amend, and then ruling on the
19 dispositive motion would possibly create piecemeal appeals, the court is inclined to first address the
20 motion for summary judgment (doc. #29) and the corresponding motions (docs #34 and #38)

21 **Motion to File Supplement (doc. #34) and Motion to Strike Sur-Reply (doc. #38)**

22 In plaintiff’s motion to file a supplement to his opposition (doc. #34), he asserts that he
23 “mistakenly neglected to include and point out relevant facts related to his response to [d]efendants’
24 argument against his entitlement to pursue punitive damages against” the defendants. He contends
25 that at that time no reply had been filed in response to his opposition, and that defendants would not
26 be prejudiced in any way. Further, he attached the proposed supplement to the motion. (Doc. #34).
27 Any opposition to the motion was due on June 3, 2011. Defendants did not oppose the motion. The
28 court is inclined to permit plaintiff to file the supplement.

1 Having not opposed the supplement, defendants filed their reply (doc. #35) in support of the
2 motion for summary judgment on May 25, 2011. Subsequently, plaintiff filed a sur-reply (doc. #36)
3 to the defendants' reply. (Doc. #36). Defendants then filed a motion to strike the sur-reply (doc.
4 #36). Defendants assert that the sur-reply should be stricken because (1) plaintiff has already filed a
5 supplement to his opposition, (2) Local Rule 7-2 and this court's minute order (doc. #30) provide
6 only for the filing of a motion, a response, and a reply, and (3) plaintiff has not sought leave of the
7 court to file the motion. The court agrees, and is not inclined to consider the arguments in plaintiff's
8 sur-reply (doc. #36). Thus, the defendants' motion (doc. #38) to strike the sur-reply is granted.

9 **Motion For Summary Judgment (doc. #29)**

10 In defendants' motion for summary judgment (doc. #29), they provide the court with a
11 plethora of reasons warranting summary judgment on plaintiff's sixth claim for relief. In his
12 remaining claim, plaintiff alleges that defendants "promulgated or permitted a policy that allowed
13 prison staff to refuse or deny [p]laintiff and inmates in general toilet paper on an as-needed basis."
14 He asserts that this violated his federal constitution, state constitution, and state statutory rights.

15 Prior to filing the complaint, plaintiff filed inmate grievances at the first and second levels
16 regarding his denial of additional toilet paper. (Doc. #29). Remaining defendants Jerry Howell,
17 Brian Williams, and James Cox responded to the plaintiff's grievances at different levels of the
18 process. *Id.* Defendant Howard Skolnik was the director of the Nevada Department of Corrections
19 during this time. Defendants contend that it is undisputed that "at all relevant times, [plaintiff] was
20 provided with one roll of toilet paper per week," and that he "could have purchased additional
21 rolls...at the inmate store," but chose to purchase "junk food," such as "chips, popcorn, and
22 barbeque sauce instead." *Id.* (Exhibit A).

23 In contrast, plaintiff argues that several of the purported "undisputed facts" stated by the
24 defendants are in fact disputed, warranting a denial of the motion for summary judgment. (Doc.
25 #33). Specifically, he contends that he was not provided one roll of toilet paper per week every
26 week, and that he was unable to get toilet paper on several occasions due to the inmate store running
27 out, his denial of access to the store, or the inmates having to wait weeks to receive their orders.
28 (Doc. #33). Further, he asserts that two prisoners were in each cell and given, at the most, only one

1 roll per week, regardless of their individual needs. *Id.* Additionally, he contends that a “black market
2 was created,” where inmate porters began selling other needy prisoners toilet paper from the “ready
3 supply of additional toilet paper kept in the nearby unit storerooms.” *Id.* Lastly, he argues that there
4 were times where he and other inmates were indigent and could not afford to purchase their own
5 toilet paper. *Id.*

6 Summary judgment is appropriate when, viewing the facts in the light most favorable to the
7 nonmoving party, there is no genuine issue of material fact which would preclude summary
8 judgment as a matter of law. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996); Federal Rule of
9 Civil Procedure 56©; *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986);
10 *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir.1987). The
11 purpose of summary judgment is to “pierce the pleadings and assess the proof in order to see
12 whether there is a genuine need for trial.” *Matsushita Elec.*, 475 U.S. at 586; *International Union of*
13 *Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir.1985).

14 The moving party bears the burden of informing the court of the basis for its motion,
15 together with evidence demonstrating the absence of any genuine issue of material fact. *Celotex*
16 *Corp.v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied its burden, it is
17 entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions,
18 answer to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue
19 for trial." *Celotex Corp.*, 477 U.S. 317, 324; Fed. R. Civ. P. 56©.

20 Here, defendants contend that summary judgment is appropriate because (1) defendants
21 cannot be sued in their official capacities for monetary relief, (2) the denial of inmate grievances
22 alone is insufficient to establish personal participation under 42 U.S.C. § 1983, (3) the plaintiff was
23 not subjected to cruel and unusual punishment by being given only one roll of toilet paper, (4)
24 defendants are entitled to qualified immunity, (5) plaintiff cannot recover compensatory damages
25 due to his inability to show more than *de minimis* physical injury, (6) plaintiff is not entitled to
26 punitive damages because no evil motive or intent was demonstrated, and (7) *pro se* civil rights
27 litigants are not entitled to attorneys’ fees.

28

1 **A. Official Capacity**

2 In plaintiff's complaint (doc. #1-2), he asserts his sixth claim against the remaining
3 defendants in their official capacity, as well as their individual capacity. In the prayer for relief with
4 respect to the sixth claim, plaintiff asks for general, compensatory, and punitive damages against the
5 defendants. Further, he seeks an injunction ordering defendant Skolnik to review and implement a
6 training procedure for his staff regarding rights of prisoners.

7 A lawsuit for monetary relief against a state official in his or her official capacity is a lawsuit
8 against the official's office rather than a lawsuit against the official. *Will v. Michigan Dep't of State*
9 *Police*, 491 U.S. 58 (1989). Further, state officials acting in their official capacities are not
10 "persons" under 42 U.S.C. § 1983. *Id.* at 71. In the case before this court, remaining defendants
11 assert that they were acting in their official capacities in the allegations, and therefore, dismissal in
12 their official capacities is warranted.

13 Plaintiff contests this argument, and contends that "because [he] seeks declaratory and
14 injunctive relief against [d]efendants with respect to count VI, the law allows [him] to proceed
15 against defendants for such relief in their official capacities." He relies on the case of *Brandon E. ex.*
16 *rel. Listenbee v. Reynolds*, 201 F.3d 194, 197-198 (3d. Cir. 2000) in his assertion. The court is
17 unable to find where plaintiff seeks declaratory relief in his complaint, and only finds a request for
18 injunctive and monetary relief. (Doc. #1-2). With regards to the injunctive relief, the court in
19 *Brandon E. ex. rel. Listenbee*, specifically stated that the amendment to § 1983 "limits the
20 availability of injunctive relief to circumstances in which declaratory relief is unavailable or
21 inadequate." *Brandon E. ex. rel. Listenbee*, 201 F.3d 194, 198.

22 Here, declaratory relief is neither sought nor adequate. Further, plaintiff seeks injunctive
23 relief only against defendant Skolnik. The other remaining defendants, Jerry Howell, Brian
24 Williams, and James Cox, cannot be sued in their official capacity for monetary relief. *Will*, 491
25 U.S. 58. Therefore, summary judgment is appropriate on plaintiff's sixth claim against defendants
26 Howell, Williams, and Cox, in their official capacities.

27 ...

28 ...

1 **B. Personal Participation/Causation**

2 Defendants and plaintiff both agree that there are two required elements of a section 1983
3 claim; “(1) the conduct complained of must have been under color of state law, and (2) the conduct
4 must have subjected the plaintiff to a deprivation of constitutional rights.” *Jones v. Cmty.*
5 *Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984). Further, the causal
6 connection may be established by “some kind of *direct personal participation* in the deprivation” or
7 by “setting in motion a series of acts by others which the actor knows or reasonably should know
8 would cause others to inflict the constitutional injury.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th
9 Cir. 1978) (Internal citation omitted)(emphasis added).

10 The defendants contend that the they merely denied the plaintiff’s grievances, and this alone
11 “is insufficient to establish personal participation under 42 U.S.C. § 1983.” *Rider v. Werholtz*, 548
12 F.Supp.2d 1188, 1201 (D. Kan. 2008); *Lomholt v. Holder*, 287 F.3d 683, 684 (8th Cir.
13 2002)(holding that the denial of prisoner grievances does not constitute a substantive constitutional
14 claim). They assert that “plaintiff must prove that the defendant[s]’ actions [were] the cause in fact
15 and the proximate cause of his injury.” *Arnold v. Int’l Bus. Machs. Corp.*, 637 F.2d 1350, 1355 (9th
16 Cir. 1981). Since the remaining defendants were not those that denied him the toilet paper, they
17 argue that there is no connection or participation on their part.

18 Plaintiff accuses the defendants of being aware of the toilet paper policy, condoning it in
19 their respective responses to his grievances, and “actually [being] responsible for it.” Thus, he
20 asserts, they participated in the deprivation and were connected to his injury. In the remaining
21 defendants’ responses (doc. #29-1 Exhibit A) to the plaintiff’s grievances, they ask him to “provide
22 documentation that lists toilet paper as a necessity of life,” assert that he was “given his weekly
23 allotment,” and state that if it is not enough that he should “purchase what [h]e need[s] from the
24 inmate [s]tore.” Further, defendants contend that his rights are not being violated, and explain to
25 him that he is not indigent and has “the means to purchase toilet paper instead of [his] recent
26 purchases of junk food, chips, popcorn, [and] barbeque sauce.” (Doc. #29-1 Exhibit A).

27 In reply to plaintiff’s arguments (doc. #35), defendants assert that they are entitled to a
28 “wide-ranging deference” as to the operations at the correctional center, including limiting the

1 inmates to one toilet paper per week. *Bell v. Wolfish*, 411 U.S. 520, 547-548 (1979). They provide
2 the court with an affidavit (doc. #35-1 Exhibit B) from Brian E. Williams, the warden at the
3 Southern Desert Correctional Center, stating that the determination of one roll per week was “based
4 upon research regarding the human consumption of toilet paper, the fact that some inmates misuse
5 the toilet paper they are provided with by creating unauthorized contraband and/or mismanaging
6 their weekly allotment, and cost saving considerations.”

7 As it has been demonstrated to the court that the rationing of the toilet paper is directly
8 related to safety issues in the facility, the court will afford the defendants the deference deserved.
9 *Bell*, 411 U.S. 520, 547-548. Therefore, the court finds that the defendants were simply following
10 the legitimate regulations of the prison in their responses to the grievances, and were not
11 participating in a scheme to deprive plaintiff of any of his constitutional rights. Defendants did not
12 have some sort of “direct personal participation” in the alleged deprivation simply by addressing
13 plaintiff’s grievances and informing him of the rules and procedures. Absent a casual connection
14 between the denial of the grievances and the alleged deprivation, plaintiff’s claim under § 1983
15 cannot survive.

16 C. Eighth Amendment

17 Cruel and unusual punishment claims can survive only if the deprivation is “objectively,
18 sufficiently serious,” whereby the conditions are posing a “substantial risk of serious harm,” and the
19 actions of the prison officials result in the denial of the “minimal civilized measure of life’s
20 necessities.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Further, only the “unnecessary and
21 wanton infliction of pain” by a prison official with a “sufficiently culpable state of mind” showing
22 “deliberate indifference” to the inmate’s safety or health will constitute cruel and unusual
23 punishment. *Id.* at 839-840. Although a prison must provide the inmates with discrete basic human
24 needs, an institution’s obligation under the Eighth Amendment is met if it provides inmates with
25 adequate food, clothing, shelter, sanitation, medical care, and personal safety.” *Toussaint v.*
26 *McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986), cert. denied, 481 U.S. 1069 (1987); *Hoptowit v.*
27 *Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982).

Here, not only is there a legitimate reason for limiting the toilet paper rolls (doc. #35-1 Exhibit A) which should be afforded the deference it deserves, but plaintiff has not demonstrated the requisite “serious,” “substantial harm,” or “the wanton infliction of pain” on the part of the defendants. *Bell*, 411 U.S. 520, 547-548; *Farmer*, 511 U.S. 825, 834, 839-840. Therefore, summary judgment is warranted on plaintiff’s claim under the eighth amendment for deliberate indifference and cruel and unusual punishment.

D. Qualified Immunity

Qualified immunity extends to prison officials, officers, and administrators, and protects “government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known.” *Procunier v. Navarette*, 434 U.S. 555, 561 (1978); *Pearson v. Callahan*, 555 U.S. 223 (2009)(internal citations omitted). Defendants assert that summary judgment is appropriate because they are entitled to qualified immunity. However, since the court granted summary judgment with regards to plaintiff’s remaining count because his claims under § 1983 and the Eighth Amendment fail, the court need not address qualified immunity at this time. Additionally, the court need not address defendants’ alternative arguments summary judgment.

E. Attorney’s Fees

Plaintiff Lyons asks this court for attorney’s fees in his complaint. First, attorney’s fees are not available to *pro se* litigants such as the plaintiff. 42 U.S.C. § 1988; *Kay v. Ehrler*, 499 U.S. 432 (1991). Second, even if plaintiff retained counsel, attorney’s fees would not be appropriate because the court has ruled against plaintiff.

Motion For Certification (doc. #27)

As previously stated, plaintiff seeks certification and final judgment of his dismissed counts and the order denying his motion to amend, that so he can appeal them to the Ninth Circuit. Further, he contends that there “is no just reason for delaying a final judgment on those dismissed counts until count six in concluded.” In light of the court’s above ruling the motion to dismiss, the motion for certification is moot.

1 Accordingly,


2 IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiff's motion to file
3 supplement (doc. #34) be, and the same hereby is, GRANTED.

4 IT IS FURTHER ORDERED that defendants' motion to strike plaintiff's sur-reply (doc.
5 #38) be, and the same hereby is, GRANTED. Plaintiff's sur-reply (doc. #36) is hereby STRICKEN.

6 IT IS FURTHER ORDERED that defendants' motion for summary judgment (doc. #29) be,
7 and the same hereby is, GRANTED.

8 IT IS THEREFORE ORDERED that plaintiff Phillip J. Lyons' motion for rule 54(h)
9 certification and final judgment as to counts 1,2,3,4,5, and 7 and denial of first amended complaint
10 (doc. #27) be, and the same hereby is DENIED as moot.

11 DATED August 9, 2011.

12
13 
14 UNITED STATES DISTRICT JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28